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In The

Supreme Court of the United States

October Term, 1994

Volkswagen of America, Inc. and
Volkswagenwerk Aktiengesellschaft,

Petitioners,

v.

Amparo Hernandez-Gomez,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Supreme Court erred in unanimously ruling that the Safety Act (15 U.S.C. § 1381, *et seq.*) does not preempt the common law claim of Respondent Amparo Hernandez-Gomez against Petitioners when:

1) Respondent's claim does not conflict with Federal Motor Vehicle Safety Standard 208;

2) Respondent's claim does not conflict with any decision of a United States court of appeals that has been decided since *Cipollone v. Liggett Meyers, Inc.*, 112 S. Ct. 2608 (1992), or with any decision of a state court of last resort;

3) The Safety Act contains an express anti-preemption provision – 15 U.S.C. § 1397(k).

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STATEMENT OF THE CASE[1]

On November 6, 1988, Respondent was riding in the right front seat of a 1981 Volkswagen Rabbit. (App., 2a). The restraint system for Respondent's seat consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut, a knee bolster and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision. (App., 2a). The system did not include a lap belt. (App., 2a).

Respondent was wearing the shoulder belt for her seat position. (PA, Tab 3). The driver briefly took his eyes off the road. The car veered off the road, ran down an embankment, struck a drainage culvert, turned over and landed on its roof. The shoulder belt failed to restrain Respondent in her seat and her head and shoulders smashed against the car's roof causing a spinal cord injury that has left her paraplegic. (App. 2a).

On October 31, 1990, Respondent filed suit against VW in Arizona Superior Court (PA, Tab 1). She alleged, under theories of negligence and strict liability in tort, that the car was in a defective condition unreasonably dangerous due to the lack of an adequate occupant

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[1] Respondent Amparo Hernandez-Gomez will be referred to as "Respondent". Petitioners Volkswagen of America, Inc. and Volkswagenwerk Aktiengesellschaft will be referred to collectively as "VW". "PA" refers to the Appendix to Petition for Review filed with the Arizona Supreme Court. "P" refers to the Petition for Review filed with the Arizona Supreme Court. "App" refers to the Appendix to VW's Petition For A Writ Of Certiorari.

restraint system to hold an occupant such as Respondent in her seat during a foreseeable rollover and that she suffered enhanced injuries, including the spinal cord injury, as a result of design defects in the occupant restraint system. (PA, Tabs 1, 4). Respondent also alleged that the lack of lap belts for the front seats was a primary defect in the car's occupant restraint system. (PA, Tab 4).

On January 15, 1993, VW filed a Motion For Partial Summary Judgment Re: Failure To Install Lap Belt. (PA, Tab 6). VW argued in its Motion: a) that it was entitled to summary judgment on the issue of whether the car should have included lap belts for the front seats because Federal Motor Vehicle Safety Standard (hereafter "FMVSS") 208 established the standard for occupant protection which VW was required to meet; b) that the occupant restraint system in the car complied with option two of FMVSS 208, c) that FMVSS 208 did not require VW to include lap belts for the front seats; and d) that federal law (15 U.S.C. § 1381, *et seq.*, hereafter the "Safety Act")[2] and regulations (FMVSS 208) either expressly or impliedly preempted Respondent's common law product liability claim against VW based on the lack of lap belts for the front seats. (PA, Tab 6).

Respondent contended in her Response to the Motion: a) that her product liability claim against VW was not expressly or impliedly preempted in any manner by the Safety Act and/or FMVSS 208; b) that, in fact, there is a specific savings provision in the Safety Act, 15

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[2] Congress recodified the Safety Act at 49 U.S.C. §§ 30101-30169, effective July 5, 1994. References to the Safety Act in this brief are to the prior sections and language.

U.S.C. § 1397(k), which preserved her claim; c) that *Cipollone v. Liggett Meyers, Inc.*, 112 S. Ct. 2608 (1992), holds that where there are provisions in a Congressional act relating to preemption a court may not proceed to find implied preemption beyond the scope of those provisions; and d) that in this case because there are preemption provisions in the Safety Act, 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k), which define the scope of preemption, the trial court may not look any further or find implied preemption. (PA, Tab 7).

The trial court issued a minute entry order dated March 16, 1993, holding that "Plaintiff's common law claim attempting to impose civil liability on VW based solely on the failure to provide a lap belt is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and its regulations. *Perry v. Mercedes Benz of North America, Inc.* 957 F.2d 1257 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F.2d. 1116 (3rd Cir. 1990)." (App., 21a).

On April 8, 1993, Respondent filed a Petition for Special Action with the Arizona Court of Appeals, Division Two, asking that the Court of Appeals reverse the trial court's minute entry order granting the Motion For Partial Summary Judgment Re: Failure To Install Lap Belt. (P. 2). On April 20, 1993, the Court of Appeals issued an order declining to accept jurisdiction. (App., 20a).

On May 20, 1993, Respondent filed a Petition For Review with the Arizona Supreme Court. On December 16, 1993, the Arizona Supreme Court granted the Petition For Review and issued its opinion on November 1, 1994, reversing the judgment of the trial court.

REASONS WHY THE PETITION SHOULD BE DENIED

VW has mischaracterized Respondent's claim in an effort to gain certiorari review. Respondent's claim is that the 1981 Volkswagen Rabbit is defective and unreasonably dangerous because its occupant restraint system fails to provide adequate restraint in rollover accidents. 15 U.S.C. § 1410b(f)(3) defines occupant restraint system as follows: "The term occupant restraint system means a system the principle purpose of which is to assure the occupants of a motor vehicle remain in their seats in the event of collision or rollover . . . "

FMVSS 208 specifies "equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208 S.2. A car manufacturer is permitted to comply with FMVSS 208 equipment requirements by choosing one of three options. VW claims that its two point passive restraint system complies with option two of 208 which is set forth in 49 C.F.R. § 571.208 S.4.1.2.2. VW's Motion For Partial Summary Judgment Re: Failure To Install Lap Belt was based on the argument that Respondent's claim that the 1981 Volkswagen Rabbit was defective because it did not include lap belts for the front seats was preempted by the Safety Act and FMVSS 208 because of VW's compliance with option two of FMVSS 208 which VW claims permitted the use of passive shoulder belts without lap belts.

Respondent does not contend that VW should have selected one FMVSS 208 option over another. VW included the two point passive restraint system in 1975 through 1989 model year VW vehicles. Prior to introducing the two point passive restraint system in the 1975

model year, VW asked NHTSA whether an active lap belt could be added to the system. (PA, Tab 9.) NHTSA told VW that it could include an active lap belt in cars equipped with the two point passive restraint system. (PA, Tab 10.) NHTSA made it clear to VW that FMVSS 208 is a minimum standard and that a manufacturer may include additional safety belts over and above what is required to comply with the minimum requirements of the standard. (PA, Tab 10.) Starting in the 1990 model year VW included active lap belts in its vehicles equipped with the two point passive restraint system. (PA, Tab 11.)

The fact that VW decided "to meet only the bare minimum performance requirements" of FMVSS 208 with its two point passive restraint system does not relieve it of tort liability for design defects in that system separate and apart from the minimum performance requirements. *Perry*, 957 F.2d at 1265.

VW made a choice in deciding not to include active lap belts in cars equipped with its two point passive restraint system. The effect of state tort law on VW's design decision is indirect. VW could have included active lap belts in cars equipped with its two point passive restraint system, thereby avoiding design defect claims based on the lack of adequate restraint in rollover accidents. The concurring opinion of Justice Blackmun in *Cipollone* explains how state tort law does not conflict with a federal regulatory scheme like the Safety Act in this type of situation.

> The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from

> positive enactments such as statutes and administrative regulations. Moreover, tort law has an entirely separate function – compensating victims – that sets it apart from direct forms of regulation. (citation omitted).

Cipollone, 112 S. Ct. at 2628, concurring opinion of Justice Blackmun. *Also see, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1062 (1985); *Gingold v. Audi-NSU-Auto Union, AG*, 567 A.2d 312, 321-23 (Pa. Super. 1989).

State regulation of safety and health matters is different than the incidental regulatory effects of damages awarded for injuries. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-186 (1988). Congress may determine that the indirect regulatory pressure of state tort law is acceptable. *Cipollone*, 112 S. Ct. at 2629, citing *Silkwood*, 464 U.S. at 256. The inclusion of 15 U.S.C. § 1397(k) in the Safety Act indicates that Congress reasonably determined that the incidental regulatory pressure of state common law on auto manufacturers was acceptable and desirable. State tort law is "neither direct nor substantial enough to warrant preemption" in this case. *Cipollone*, 112 S. Ct. at 2629, citing *English v. General Electric Company*, 496 U.S. 72 (1990).

The legal duty that is the predicate of Respondent's common law claim in this case is the duty to use reasonable care in designing a product and/or to design a product that is not in a defective condition unreasonably dangerous to a user. *Rossell v. Volkswagen*, 147 Ariz. 160, 709 P.2d 517 (1985); *Gosewisch v. American Honda Motor Co.*, 153 Ariz. 400, 737 P.2d 376 (1987). These duties do not

constitute minimum *performance* standards for motor vehicles as contemplated by the Safety Act. The facts of each case are applied to the duties to determine if there has been a breach. If there has been a breach and injury has occurred as a result of the breach, then the manufacturer is liable and must compensate the injured person. There is no conflict between Congress' objectives regarding the Safety Act and common law tort liability for failing to design an occupant restraint system to perform in a manner "that effectively exceeds the federal minimum standards." *Perry*, 957 F.2d at 1264.

The Arizona Supreme Court correctly followed *Cipollone* in finding that Respondent's design defect claim against VW is not preempted by the Safety Act and that the savings clause (15 U.S.C. § 1397(k) "expresses Congress' intent to allow state common law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers." (App., 18a).

In following *Cipollone*, the Arizona Supreme Court relied not only on *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), cert. granted, 115 S. Ct. 306 (1994), but also on cases from other federal circuits which have addressed federal preemption since *Cipollone* and which "consider expression of preemption in a statute's text the 'reliable indicium of congressional intent'." *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 345, 358 (8th Cir. 1993); *Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2nd Cir. 1992); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447

(10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 86 (1993); *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 823 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

VW's petition does not satisfy the considerations governing review on writ of certiorari set forth in Sup. Ct. R. 10. The opinion of the Arizona Supreme Court does not conflict with *Cipollone*, with any decision of a United States court of appeals that has been decided since *Cipollone* or with any decision of a state court of last resort. Accordingly, this Court should deny review because VW's petition fails to satisfy the considerations set forth in Sup. Ct. R. 10.

The opinion of the Arizona Supreme Court involves the trial court's ruling on a *partial* motion for summary judgment. VW's petition is premature. A trial on the merits before a jury may result in the case being decided on issues other than the one raised by VW in its petition. Respondent has been waiting for over four (4) years to have her case decided on the merits. Therefore, this Court should deny the petition thereby permitting the case to proceed to trial without further delay.

Freightliner Corp. v. Myrick, No. 94-286, involves FMVSS 121 and the issue of whether manufacturers have an option under that standard to install anti-lock brakes. This case involves FMVSS 208 and the issue of whether the 1981 Volkswagen Rabbit was defective and unreasonably dangerous because it failed to provide adequate occupant restraint in the rollover accident. Thus, this

Court's disposition of *Freightliner Corp. v. Myrick*, No. 94-286, is not relevant to VW's petition and the petition should be denied immediately.

VW claims at p. 15 of its petition that 15 U.S.C. 1392(d) does not describe the state authority Congress intended to displace. VW cites no legal authority in support of the argument. More importantly, the argument is contrary to the plain language of the statute. As the Arizona Supreme Court explained in its opinion, the text of 15 U.S.C. § 1392(d) "expressly precludes any state from establishing, or prescribing, a safety standard not identical to the same aspect of performance targeted by a federal standard." (App., 16a).

VW's next argument at pp. 15-16 of its petition that 15 U.S.C. § 1392(d) "does not provide a 'reliable indicium' of Congress's preemptive intent because it does not reflect all of the available evidence of Congress's thinking" is equally weak. The sole stated purpose of Congress in enacting the Safety Act on September 9, 1966, was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Safety Act requires that the Department of Transportation promulgate "Federal Motor Vehicle Safety Standards (FMVSS)" which are to be "*minimum*" standards for motor vehicle performance or motor vehicle equipment performance . . . " 15 U.S.C. § 1391(2) (emphasis added). When Congress enacted the Safety Act, it was fully aware that it was legislating in an area previously governed only by state law. For that reason, Congress explicitly addressed what it *did* and *did not* intend to preempt in two separate sections of the Safety Act.

The first section, 15 U.S.C. § 1392(d), explained the preemptive effect that Congress intended the Federal Motor Vehicle Safety Standards to have on state and local safety standards. The second section, 15 U.S.C. § 1397(k), explained the effect that Congress intended the Federal Motor Vehicle Safety Standards to have on common law claims. Given the unequivocal language of these two sections, Congress' intent is clear. Section 1392(d) preempts state and local standards governing the same aspect of performance as federal standards, and § 1397(k) expressly preserves all common law claims. Section 1392(d) has nothing to do with common law claims; it applies to "state standards."

The legislative history of the Safety Act confirms the clear and explicit intention of Congress not to preempt common law claims. The Senate's version of the proposed Safety Act did not contain § 1397(k), but did contain § 1392(d). Despite that fact, the Senate Committee Report made it clear that compliance with federal standards would not preempt common law claims. The Report stated: "The federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2720.

The Senate Committee Report was not good enough to the House of Representatives so it added § 1397(k). The House Committee Report states:

> *Common law liability* – 108(c) of the reported bill [15 U.S.C. § 1397(k)] provides that compliance with any federal motor vehicle safety standard

> does not exempt a person from any liability under common law.
>
> *It is intended,* and this subsection specifically establishes, *that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law* particularly those relating to warranty, contract, and *tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

The statements of individual Congressmen were equally certain: "[C]ompliance with Federal standards does not exempt any person from common law liability." 112 Cong.Rec. 21,487 (remark of Sen. Magnusson).

The legislative history of 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k) and the plain and explicit language of those sections indicate: 1) Congress considered the issue of preemption; 2) Congress included a provision explicitly addressing the issue of preemption in the Safety Act: and 3) The provision included in the Safety Act by Congress (15 U.S.C. § 1397(k)) "provides a 'reliable indicium of Congressional intent with respect to state authority,' *Malone v. White Motor Corp.*, 435 U.S., at 505, 98 S. Ct., at 1190, . . . " *Cipollone,* 112 S. Ct. at 2618. Accordingly " 'there is no need to infer Congressional intent to preempt state laws from the substantive provisions' of the legislation. (citation omitted)." *Id.* at 2618. 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k) define the preemptive reach of the Safety Act. Thus, there is an implication "that matters beyond that reach are not preempted." *Id.* at 2618.

Cipollone definitively establishes that a court may not, "absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language." (Footnote omitted) *Id.* at 2626. The language of 15 U.S.C. § 1397(k) is unambiguous that "any person" is not exempted "from any liability under common law" by complying "with any motor vehicle safety standard issued under this subchapter."

There is no authority to support VW's argument at p. 16 of its petition that the savings clause, 15 U.S.C. § 1397(k), was added "to prevent implied field preemption from entirely displacing state law." On the other hand, in *International Paper Co. v. Ouellette*, 107 S. Ct. 805, 812-13 (1987), even though the Court found that the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, precluded "a court from applying the law of an affected State against an out-of-state source", it also found that a general savings clause specifically preserved other common law actions that did not interfere with the achievement of the "full purposes and objectives of Congress." *Id.* at 812, 814. Design defect claims do not interfere with Congress's intent regarding the Safety Act. They are consistent with the intent of Congress in encouraging safety.

VW's claim at p. 16 of its petition "that Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to require airbags in all new motor vehicles" is just not true. When Congress enacted Pub.L. 102-240, § 2508(d), it included a savings clause preserving the liability of motor vehicle manufacturers under applicable law. The text reads as follows:

> "Nothing in this section or in the amendments made under this section to Federal Motor Vehicle Safety Standard 208 shall be construed by any person or court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." Pub.L. 102-240, § 2508(d).

15 U.S.C. § 1397(k) and Pub.L. 102-240, § 2508(d) are both savings clauses that preserve manufacturer liability. They both make perfect sense. Automotive safety technology advances more rapidly than Federal Motor Vehicle Safety Standard rule making. Thus, Congress recognized that even though a manufacturer may comply with the minimum performance standard established by FMVSS 208, a vehicle may be defective because it does not incorporate technological advancements that have occurred since the latest NHTSA rule making or Congressional action. The savings clause protects individuals who are injured by defects in vehicles that meet the minimum performance standard and provides incentive to manufacturers to include safety advancements in their vehicles.

Another reason for the savings clause is that a manufacturer also may come into possession of information about the operation or maintenance of occupant protection systems in its vehicles, the non-disclosure of which renders the vehicle defective. The savings clause provides motivation for the manufacturer to disclose such information to the consumer in a timely manner and protection for the consumer who is injured as a result of not receiving the information.

The fact that in 1991 Congress enacted another savings clause as a part of a statute requiring amendments to Federal Motor Vehicle Safety Standard 208, reaffirms the original intention of Congress when it enacted the Safety Act to preserve the right of individuals to pursue actions for damages against motor vehicle manufacturers.

Contrary to VW's assertions at p. 16 of its petition, H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1783, shows that Congress did not want to change existing liability law by the adoption of Pub.L. 102-240, § 2508(d).

> With respect to subsection (d), the Conferees, noting NHTSA's letter of November 7, 1991, do not want by this section to change the law on liability as it existed prior to enactment. This section is not intended to be a "sword" or a "shield" in litigation or otherwise.

1991 U.S.C.C.A.N. 1783.

VW is wrong in claiming at p. 17 of its petition that the Arizona Supreme Court held that 15 U.S.C. § 1392(d) does not expressly preempt common law claims because there is no mention of such claims in the subsection. What the Arizona Supreme Court actually held is that when 15 U.S.C. § 1392(d) is read with the savings clause, 15 U.S.C. § 1397(k), "[t]he inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected preemption of state tort law claims like the one in this case." (App., 17a). In footnote 17 of its opinion, the Arizona Supreme Court discussed the fact that 15 U.S.C. § 1392(d) does not mention common law claims and noted that: a) the absence of

mention did not permit the court to conclude that Congress intended to preempt such claims; b) on the contrary, the absence of mention indicates "that Congress did not intend preemption"; c) *Cipollone* recognizes that the phrase 'state law' includes common law; d) *Cipollone* also recognizes that "the presumption against preemption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context"; and e) the "savings provision in the Safety Act" is "another good reason for construing the phrase narrowly in this case". (App., 17a n.17).

In *Cipollone* this Court considered the fact that Congress did not expressly include common law within the pre-emptive reach of § 5(b) of the Public Health Cigarette Smoking Act of 1969 (15 U.S.C. § 1334(b)), as it has in other statutes and "the fact that Congress did not include a savings clause preserving common law claims, again, as it has in other statutes." *Id.* at 2621, n. 22. The Court concluded:

> "Under our analysis of § 5, these omissions make perfect sense: Congress was neither pre-empting nor saving common law as a whole – it was simply pre-empting particular common law claims, while saving others."

Id. at 2621, n. 22.

The Safety Act (15 U.S.C. § 1381, *et seq.*) includes a savings clause – 15 U.S.C. § 1397(k). Therefore, under the *Cipollone* analysis, the inclusion of the savings clause in the Safety Act evidences the intent of Congress to save "common law claims as a whole."

VW cites no authority to support its claim at pp. 17-18 of its petition that 15 U.S.C. § 1397(k) "negates only as an affirmative common-law defense of compliance with a government standard." *Taylor v. General Motors Co.*, 875 F.2d 816, 824 (11th Cir. 1989), correctly rejected the same argument reasoning that such a construction would make the savings clause redundant because the pre-emption clause "provides that where a federal standard does not govern 'the same aspect of performance' as the state standard, the state standard is not pre-empted." The adoption of VW's argument would render § 1397(k) "superfluous". *Id.*

The savings clause, 15 U.S.C. § 1397(k), does not "subvert" the federal regulatory scheme. Rather, the savings clause expresses the intent of Congress that the right of consumers to bring common law actions to recover for product defects should be preserved because such actions encourage manufacturers to make safer vehicles thereby promoting the primary purpose of the Safety Act.

CONCLUSION

The Arizona Supreme Court correctly followed *Cipollone* in rendering its opinion. For the above reasons, VW's petition for a writ of certiorari should be denied.

Respectfully submitted,

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